90-81

No. ....

Supreme Court, U.S.
FILED
JUN 28
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

W. DAVID WESTON
Petitioner/Appellant

v.

JEFFREY G. BANKS ET AL.
Defendants

On Writ of Certiorari to the United States Circuit Court of Appeals For the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI APPELLANT

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QUESTIONS PRESENTED

May the appellate court find that a lower court's decision was not clearly erroneous when the lower court's decision was based upon a conclusion of law which the appellate court correctly overturned, and may the appellate court then make new findings of fact as a sole basis for upholding the trial court's decision which new findings were contrary to the trial court's findings and the record?

May the appellate court make it's own findings of fact on a critical issue where such findings are contrary to the findings of the lower court and the record?

May the appellate court correctly make a conclusion of law in interpreting a

contract critical to a determination of the case which conclusion is contrary to the conclusion of law of the trial court and not find the trial court's conclusion clearly erroneous?

After the appellate court decided that the agreement between the parties provided that the defendants were required to pay assessments, did the appellate court then err in further failing to determine that the district court's findings were clearly erroneous where the district court, to the contrary, found that the plaintiff wrongfully assessed the defendants and therein breached its fiduciary duty to the defendants and acted in bad faith?

PARTIES TO THE PROCEEDINGS

The parties to the Cascade v. Banks et al., proceeding in both the United States District Court for the District of Utah and the Tenth Circuit Court of Appeals were:

CASCADE ENERGY AND METALS CORPORATION, a Nevada corporation,

Plaintiff-Appellee, Cross-Appellant

v.

JEFFERY G. BANKS, KENNETH CALDWELL, COASTAL COMPUTER INVESTMENTS, a California partnership, ELMER J. DAVIS, HARMATZ and HODOWSKI, a California partnership, DAVID G. HENRY, ROGER A. MANN, H.E. MOSES, ROBERT A. NICKERSON, PETER P. SAMARIN, HERBERT W. STOLTENBERG, EDWIN STOLTENBERG, CHRIS WAUGH, SAMUEL HARMATZ, BERNARD HODOWSKI, PATRICIA STOLTENBERG, MANN CALDWELL PARTNERSHIP, a partnership. DELFORD R. ASHLEY, GEORGE SLATER, PATRICIA SLATER, ROBERT DOUB, SAM HAMBARIAN, ALYCE HAMBARIAN, LIONEL ASCHER, A.C. NEJEDLY, R.E. DONAHEY, GRACE V. DUNCAN and ELLIOT WEINBERG,

Defendants-Appellants, Cross-Appellees.

JEFFERY G. BANKS, KENNETH CALDWELL, COASTAL COMPUTER INVESTMENTS, a California partnership, ELMER J. DAVIS, HARMATZ and HODOWSKI, a California partnership, DAVID G. HENRY, ROGER A MANN, MANN CALDWELL PARTNERSHIP, H.E. MOSES, ROBERT A. NICKERSON, PETER P. SAMARIN, PATRICIA STOLTENBERG, HERBERT W. STOLTENBERG, EDWIN STOLTENBERG, CHRIS WAUGH, DELFORD R. ASHLEY, GEORGE SLATER, PATRICIA SLATER, ROBERT DOUB, SAM HAMBARIAN, ALYCE HAMBARIAN, LIONEL ASCHER, A.C.NEJEDLY, R.E. DONAHEY, GRACE V. DUNCAN, ELLIOT WEINBERG, BERNARD HODOWSKI and SAMUEL HARMATZ,

Counterclaimants, Crossclaimants, Cross-Counterdefendants, Appellants, Cross-Appellees,

v.

CASCADE ENERGY AND METALS CORPORATION

Counterdefendant, Cross-Counterclaimant, Crossclaim Defendant, Appellee,

and

W. DAVID WESTON, TELEGRAPH MINE LIMITED, a partnership, REX MONTIS SILVER CO., TELEGRAPH MINE JOINT VENTURE, GOLD TECHNICS, LTD., JAMES F. PETERS, as TRUSTEE of the GNOLAUM UNITRUST,

Cross-Counterclaimants, Cross-Defendants, Crossclaim Defendants, Appellees, Cross-Appellants.

and

HAROLD MASUNAGA, MARION HARADA, UKIO AYABE, LYLE MULLER, CHARLES HIGASHI, JOSEPH GREEN, and WILLIAM Y. OHARA.

Amici Curiae.

Delano S. Findlay, Salt Lake City, Utah for Cascade Energy & Metals Corporation.

Richard A. Love of Reish & Luftman, Los Angeles, California and Ron Goss and Carolyn Montgomery of Van Cott Bagley, Salt Lake City, Utah for Jeffery G. Banks, Kenneth Caldwell, Coastal Computer Investments, Elmer J. Davis, David G. Henry, Roger A. Mann, Mann Caldwell Partnership, Robert A. Nickerson, Peter P. Samarin, Patricia Stoltenberg, Herbert W. Stoltenberg, Edwin Stoltenberg, Delford Ashley, George Slater, Patricia Slater, Robert Doub, Sam Hambarian, Alyce Hambarian, and Lionel Ascher (the "Associate Defendants") Samuel Harmatz, Bernard Hodowski, A.C. Nejedly, Chris Waugh, H.E. Moses, R.E. Donahey, Grace V. Duncan, Elliott Weinberg, and Harmatz and Hodowski partnership (the "Gold Technics Defendants")

W. David Weston Pro Se for W. David Weston

Ronald S. George, Pocatello, Idaho for Telegraph Mine Limited.
Lynn P. Heward, Salt Lake City, Utah for Rex Montis Silver Company
Delwin T. Pond, Salt Lake City, Utah for Gnolaum Unitrust and Amici Curiae.

The petitioner presents himself and his arguments Pro se before this Court of last resort with some trepidation, aware of the weighty matters of constitutional and other questions of law significant to the national need which are most generally presented for review. None the less petitioner has sought justice in the matter placed before the Court for over seven years, which in the term of a single life time is not an insignificant period, and prays that this Court of last resort will hear and act on petitioners prayer for relief in the interest of justice for just one of it's citizen constituents.

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TABLE OF AUTHORITIES

Cases:

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Stangle v. Todd, 554 P.2d 1316, 1319-20 (Utah 1976).

U.S. - Equitable Life Assurance Soc. of U.S. v. C.I.R., 64 S.Ct. 722, 321 US 560, 88 L.Ed. 927, rehearing denied 64 S.Ct. 941, 322 US 767, 88 L.Ed 1593

Statutes:

28 U.S.C. § 1254(1)
28 U.S.C. § 1291
Revenue Code § 59(e)(4).

Miscellaneous:

C.J.S. Federal Courts 204(3).

Loren L. Mall, Public Land and Mining Law, Text and Cases, Page 160, The Butterworth (Legal Publishers), Inc.

Supreme Court Rules Rule 10.1(a)

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

No.

W. DAVID WESTON
Petitioner/Appellant

v.

JEFFREY G. BANKS ET. AL.
Defendants

PETITION FOR WRIT OF CERTIORARI

JURISDICTION ON WRIT OF CERTIORARI

Review of Writ of Certiorari... will be granted... (a) When a Federal Court of Appeals has rendered a decision... has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. Supreme Court Rules, Rule

10.1(a).

OFFICIAL REPORTS OF OPINIONS BELOW

Cascade v. Banks et al, No. 86-1156, 86-1157, 86-1202 in United States Court of Appeals for the Tenth Circuit, the opinion is reported at 896 F.2d 1557

Cascade v. Banks et al., No. 82-C-1223C in the United States District Court for the District of Utah

GROUNDS FOR JURISDICTION OF THE COURT

The opinion of the Tenth Circuit Court of Appeals in the Cascade v. Banks, matter was dated February 16, 1990. Jurisdiction in the Appeals Court was based upon 28 U.S.C. § 1291. A petition for rehearing by cross-defendant W. David Weston was denied on April 25,

1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)[1]

STATEMENT OF THE CASE

In 1980 certain joint venture parties known as Associates subleased working interests in seven mining claims comprising a gold mine located in California known as the Telegraph Mine. The Associates had three business objectives 1. (a) Develop and (b) Operate a gold mining enterprise, 2. Sell gold for cash or take gold in kind, 3. Qualify a federal tax deduction early to offset risk. The Associates hired Cascade

[1] "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;..."

Energy and Metals Corporation as their common "operating manager." The Associates obtained an $800,000 "development" loan to be used by their operating manager on a best efforts basis for "development purposes only" as that term is used in the mining industry. In late March of 1982 'development work' through the expenditure of the $800,000 had been completed and production commenced using a method known as heap leaching for extracting the gold from the ore.

During start-up production in April and May of 1982 there were some delays due to extremely bad weather and the operating manager assessed the Associates for the costs of production until profits from the sale of gold was sufficient to pay all production expenses. Some of the Associates paid the pro-

duction costs when assessed and others did not which frustrated and impeded the operating manager's ability to produce. None the less, by the end of October, 1982, 23,080 tons of ore had been mined, crushed and removed to the leach pad for final gold extraction. 504.67 ounces of gold had been extracted and sold for $175,233.87. 4790.87 ounces of gold remained under a continuous process of gold extraction which had a "contemplated" extractable value of $1,015,880 (gold at $344.98 pr/oz). By the end of October 1982 the Associates had been assessed $321,984.60 (pro rata 1/35 $9,199.56). The Associates formed a management committee in August 1982 to oversee the operating manager and ostensibly to collect the assessed amounts. In early October 1982 the

Associates management committee hired a professional mining engineer Mr. Martin Hughes to review the project operations. After a lengthy review Mr. Hughes reported to the committee:

> "This project has been initiated in a very good and effective manner. If, properly supported, it is now at the point of consistent operation and good results." (Exh. 229).

The dispute over payment of assessments which arose initially in September of 1982 culminated on December 2, 1982 when Associate Herbert Stoltenberg declared for the first time that the contract documents did not permit assessments beyond the $800,000 initial development loan. It was the opinion of the operating manager and the Associates who were paying the production assessments that the contract documents required the Associates to pay production costs for

mining and milling the ore out of their share of the **contemplated** gold production to be obtained when the ore was removed to a leach pad facility for final extraction. On December 15, 1982 Cascade Energy as Plaintiff initiated an action in the United States District Court for the District of Utah, known as Cascade v. Banks et al., No. 82-C-1223C to collect the unpaid assessments. The non paying Associates brought a cross-claim and counterclaims against the Lessors who also crossclaimed. The District Court acquired jurisdiction based on diversity of citizenship, the amount in controversy was in excess of $10,000 and some claims involved federal securities laws. The case commenced trial on October 9, 1985 and a final judgment was issued by the District

court in September of 1986. Thereafter the non-paying Associates appealed the decision of the district court to the Tenth Circuit Court of Appeals and the plaintiff and others associated with the lessors cross-appealed.

In it's decision the lower district court found as a conclusion of law (No. 7) that the contract documents did not provide for assessability beyond the initial development loan amount of $800,000 and that both Cascade and Weston, it's president, knew of that fact and acted in bad faith by maintaining the agreements provided for assessability.

> "7. The interests of the Associates in the sublease and claim were not assessable and Cascade willfully and wrongfully maintained that they were."

On the other hand the district court found the project was economically viable and might have a produced a profit

from the gold being produced during the period the Associates were in control of the property. The foundation for this Petition for Certiorari is a firm, explicit and correct conclusion of law made by the court of appeals, which overturned the conclusion of law made by the trial court as follows:

> "In our view, paragraphs 13(b) and 13(c), when read together, provided that the Associates **were required to pay additional development and production costs** out of their share of the **contemplated** gold production. Under the plain language of paragraph 13(c) -- which begins 'Notwithstanding anything to the contrary contained herein'-- the Associates are not responsible for additional payments beyond each associates share of the minerals that were actually produced and removed from the mine."(emphasis added) Cascade v. Banks 896 F.2d 1557, 1568

Thus, the appeals court found, the meaning of the agreement between the parties as to assessability was that the Associates were responsible for addit-

ional payments up to the value of their interest in the ore removed from the mine and hence that assessments were permitted for the "mining, milling and removal of ore" i.e "minerals that were actually produced and removed from the mine."

This conclusion of law by the appellate court was contrary to Conclusion of Law No. 7 made by the trial court on the same subject.

One of the vital **facts** found by the trial court was that the ore in place was economically valuable ore. It is so stated by the court:

> "I cannot find and have not found that the Telegraph Mine project with adequate financing...could not be economically viable. Indeed, I have already indicated my general acceptance of the reports of the geologists to the contrary." (D.C. Trial Transcript of March 27, 1985, p. 244.)

And also in finding no 116, p. 100:

> "The property does contain extensive deposit of ore that...might have been operated at a profit from the gold and silver produced therefrom during the participation of the defendant associates."

These findings were also supported by the report of engineer Martin Hughes to the Associates in October of 1982. (See page 6.)

Based upon it's conclusion of law that no assessments were warranted beyond the $800,000 development loan the trial Court made no findings generally with regard to the amount of gold then actually produced or then under production, but the record was replete with evidence of the amount of gold available for extraction in the ore on the leach pad and the amount of gold actually produced in bar form and sold.

The appeals court found that no gold was produced.[2] This finding was contrary to the district court's findings that the project was economically viable and the evidence in the record regarding the $1,015,880 value of the gold then under extraction on the leach pile and the $175,233.87 value of the gold sold. Based on its erroneous finding that no gold was produced, the appeals court made new findings to the effect that Cascade and Weston acted in bad faith knowing assessments were not warranted. These findings were contrary to the findings of the district court and the evidence in the record as noted which established that gold was produced.

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[2] Cascade v. Banks, supra, pgs. 1565, 1566, 1569, 1570.

To follow the appellate court's reasoning if gold bearing ore was produced, assessments as then warranted were required to finance continuing production costs in order to attain the objectives of the parties in entering into the agreements. As assessments were a necessary obligation to obtain the purposes of the Associates it only follows that a pro rata collection of assessments was necessary for the protection of the parties interests who had paid their assessments.

Thus, when taken together, i.e. i) the appellate court's ultimate **conclusion of law** that the parties' agreement allowed for assessments limited to the value of each Associates interest in the ore removed; and ii) the trial court's ultimate **fact** that the Associates

project was economically viable, supported by the evidence that valuable ore was being mined, milled and removed from the property for final gold extraction then valued at $1,015,880; that extracted gold in the amount of $175,233.87 had been sold; that the extraction of gold was increasing and continuous, it follows that the district court's findings that Cascade and Weston acted in bad faith in seeking collection of the assessed amounts was clearly erroneous.

ARGUMENT

I. THE APPELLATE COURT CORRECTLY CONCLUDED THE AGREEMENTS PROVIDED FOR ASSESSABILITY, BUT, MADE ERRONEOUS NEW FINDINGS AS A BASIS FOR NOT REVERSING THE TRIAL COURT'S CONTRARY CONCLUSION THAT THE AGREEMENTS DID NOT ALLOW ASSESSMENTS

When taken together, the above ration-

al conclusion of law[3] by the appellate court that the contracts were assessable within certain limits, and the facts of this case regarding the value of the mine as found in the record and in the district court's findings,[4] are exactly what the parties originally intended to capitalize the production costs as

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[3] The interpretation of a contract is a question of law for the Court's determination Orson v. United States Fidelity and Guaranty Co., 157 P.2d 149 (Utah 1978).

[4] Geologists Dr. Mead LeRoy Jensen and Joseph Owens testified at the District Court trial. Dr. Jensen appraised the net value of the 540,000 tons of probable ore in place to be $41,000,000. He examined the property in 1981 and again in 1983. In his report to the Associates in 1981 he stated: "The volumes (72,000 measured tons) used by both (geologists) Ito and Owens are acceptable, therefore... assuming heap leaching ...$154.60/value per Ton x .75% extraction x 300,000 Tons = $34,785,000. The District Court in it's Finding 97 stated: "the preponderance of the evidence supports the substantial accuracy of the geologists' reports..."

necessary to produce a positive cash flow from profitable gold production. But, the trial court became distracted from it's findings as to the economic value of the ore. The court misapplied the meaning of the terms "development" and "production" in it's interpretation of the parties contracts.[5] The agreements required that these terms be defined by their usage within the mining industry (JOA ¶ 4). This the trial court did not do in arriving at it's contract interpretation and made an egregious error of creating a false conclusion of law as to the meaning of the agreements as to assessability, which the appeals court expressly corrected. But, then the

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[5] The parties contracts consisted of a "Joint Operating Agreement" (herein called "JOA") a "Sublease and Working Interest Agreement" and a "Management Committee" agreement.

appeals court, having corrected the law of the case regarding the agreements providing for assessability, proceeded to overrule the trial court's findings of fact and the evidence in the record as to the value of the ore in the mine and under extraction by demeaning its value. The new findings made by the appeals Court that little or no gold was produced appears to be a basis for it's decision to uphold the lower court's decision that Cascade and Weston had breached their fiduciary duty[6] by assess-

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[6] Trial Court Finding 117, Accounting Findings 11, 12, 13 and 18. The trial court found that Cascade, breached its fiduciary duty of good faith by seeking to impose liability on the Associates for the assessments and in bringing an action to collect the assessments. The court's finding of bad faith was premised on: 1) the contracts were non-assessable, 2) Cascade knew the contracts were non-assessable, 3) sometime, Cascade new production proceeds would not be enough to meet costs and the only means for continued operations was financing from the Associates beyond their contract

ing defendants when they knew that assessments were not authorized and thus acted in bad faith, as the appeals court found:

> "After reviewing the record here, we cannot say that the district court's finding that Weston and Cascade breached their fiduciary duties to the Associate Defendants is clearly erroneous."

Now the only way the appeals court could reach a decision that Weston and Cascade had breached their fiduciary duties and no assessments could be made, after having found that the agreements were assessable, was by finding that the ore was valueless, and it did this in the following expressions which are not supported by the trial court's findings or

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liability, 4) Cascade hoped the Associates would pay voluntarily, 5) when the Associates did not pay voluntarily, Cascade devised a theory of liability under the contracts.

the record and accordingly are not

factually accurate: App/dec pp. 10-12.

"By **September 1981**, the heap leaching method had not produced any gold...[7]

"Months passed... there was not much gold produced."

"By February 1982, the...loan had been consumed and still no gold production[8]

"By July 1982, there was still no gold."[9]

"Three Associates... sampled the leach pile... found that the pile had little gold in it and that Weston and Cascade

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[7] By September of 1981 "development" work was only half completed, no leach pad had been constructed and no production was contemplated.

[8] "Development work did not conclude until the end of March of 1982 and following initial leach testing "production" did not commence until April 1982.

[9] By July 31, 1982 11,710 tons containing at least 2459 OzAu/Tn was loaded on the leach pile (1770 Oz Au recoverable (72%) $601,800 at $340 Oz/Tn) See D.C. NR215. Regarding gold values See D.C. Exh. 91, 152, 900 901, 903 and 905.

had been mining low quality ore."[10]

"In September 1982... there was still no gold."[11]

"The associates... put limits on quality ore mined so they would not have to pay for Cascade's mining of low quality ore."[12]

That the foregoing characterization of

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[10] The Associates incorrectly sampled the leach pile by driving a pipe a few feet into the surface at an angle. The ore subsequently assayed had already been leached of gold as leaching commences first on the surface. The District Court found that these results were erroneous.

[11] By September 30, 1982 21,980 tons of ore was loaded on the leach pad containing 4594.75 ounces of gold and $145,188. of gold had been sold.

[12] See Trial Transcript. pg. 1845 and Trial Exhibit 152. Some members of the Associates Management Committee directed that gold production be limited to a gold content in the ore of .12 Oz/Au/Tn. The operator objected to this decision as unwise. Later in October Martin Hughes advised the Associates that this limit was unrealistically to high and would cause the loss of a substantial profit. Nevertheless the directive demonstrates the Associates believed they were obligated for production costs.

the facts is so egregiously erroneous is seen (1) in its being contrary to the finding of the trial court that the ore was valuable, (2) in the clear evidence in the record that gold was produced and significant amounts of gold were on the leach pad under extraction, (3) In the fact that production did not commence until April of 1982, the prior period being used for mine "development" only.

II. THE TRIAL COURT FAILED TO APPLY THE MINING INDUSTRY AND IRS DEFINITIONS OF "DEVELOPMENT" AND "PRODUCTION" AS REQUIRED TO INTERPRET THE JOINT OPERATING AGREEMENT ("JOA"); THE APPELLATE COURT IN NOT APPLYING THE DEFINITION OF THESE TERMS MADE ERRONEOUS NEW FINDINGS.

The JOA expressly required in ¶ 4 which spoke of "development" and "production" that the terms usage in the contracts be interpreted "as that term is used in the mining industry.

In the text "Public Land and Mining Law," written for the interpretation of mining law,[13] the industry terms "Development" and "Production" are defined as separate isolated events with distinct and segregated costing. The U.S. Internal Revenue Service similarly defines the terms for purposes of separating taxing events and require assessability in determining that the project was economically viable.[14] The mining industry definitions as set out below were ignored by both lower court's in their decision's regarding the

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[13] See applicable portions of the text Loren L. Mall, Public Land and Mining Law, Text and Cases, Page 160, The Butterworth (Legal Publishers), Inc. in Appendix "B"

[14] Revenue Code § 59(e)(4). See Brooks v. Commissioner, 424 F.2d 116 and Getty Oil vs U.S. Government, 399 Fed 222,22; See Cascade Opening Brief Appendice "B" pge 28

contracts assessability.[15]

> "(c) **Development of Mineral Deposits.** Exploration work continues until general knowledge has been obtained of...general geological characteristics, and...grade of an ore deposit... Thereafter,...to study the... economic feasibility of producing the deposit. **All the steps after exploration and before production of minerals which are taken to block out, or define, the mineral deposit and to open a mine...are properly known as development work.**
>
> [**Production consists of] Extraction and processing**...For hardrock deposits, substantial investment is

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[15] See Cascade Energy & Metals opening brief pages 4-6 as set forth in Appendix B. The appellate court and the trial court's decision both incorrectly have development funds paying production costs? Appellate Decision pg 8-9 quotes the JOA ¶ 2(h),4,(no development loan money permitted for production costs.) "Cascade...to use... development loan to develop the mine...and prepare for gold production. Yet, inconsistently complains on Appellate Decision page 11, that no gold was produced during development. This inconsistency confuses the trial court's finding "that I learned quickly on that the mine could not be put into production for $800,000. By the Court's own admission the $800,000 could not be used for production costs! Only by mid March 1982 was the mine prepared for production.

> usually required for both extraction and processing...once the ore mineral is concentrated, it must usually undergo additional processing in order to isolate the useful mineral sought. Production of minerals may be by... surface mining [open pit], underground mining... Loren L. Mall, Public Land and Mining Law, Text and Cases, Page 160, The Butterworth (Legal Publishers), Inc. (emphasis and explanation added)

By early 1980 exploration and feasability studies for an underground mine at Telegraph had been completed. The geology and grade of ore had been defined. Prior to July 1981, due to extraordinary hyper-inflation, the economic feasibility of the underground mining plan was in jeopardy. That the $800,000 loan was insufficient for underground development was communicated to the Associates at an Associate meeting in July 1981. At this meeting an alternate feasibility study was presented using a new technology called

"heap leaching" and upon their own motion approved by the Associates. This plan still required $800,000 for development expenses only. "Development work" under the new plan commenced when construction started on the mine camp, maintenance building, crushing plant, the open pit, heap leaching facilities and when applications for mining permits were prepared.[16] Development was completed in late March 1982 when the construction, preparation and permitting was complete. The project only then had been made ready for production. In accord with Industry, IRS and JOA ¶ 2(h),4 definitions all funds segregated for development were spent on development only.[4] These expenditures were

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[16] See District Court Trial Exhibit No. 66.

controlled by an Associates committee.[17] Production, i.e mining and crushing of ore; then started-up in April 1982. A positive cash flow was expected by the end of June 1982. Due to force majeure events (El nino weather) sufficient gold was not then able to be extracted from the ore on the leach pile by the end of June to pay continuing production costs. Thereafter, Associate delays in paying these production short-falls or not paying diminished cyanide levels in the leaching solution reducing gold recovery and delayed building the leach ore pile

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[17] Note: JOA ¶ 4 contractually requires the "Manager to **Develop** the Property...**as that term is used in the mining industry.**" See District Court Trial Exhibits No. 131.06/41.03 4/15/82. The Appellate Court in Ap/Dec footnote 7 gives Cascade sole signature authority over development funds and on App/Dec page 11 inconsistently gives Associates signature authority.

to its optimum production size.[18] None the less as noted herein significant amounts of gold ore was removed; gold was extracted and sold.

Accordingly all references by the lower court's to the payment of production costs through development expenditures is clearly erroneous. All references cited by the lower courts to the language "pre-development" as found in early correspondence were misnomers intending to be "pre-production" (same as "development"). "Pre-development" could only refer by definition to exploration or feasibility studies which were all completed.

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[18] See District Court NR215

III. CASCADE AND WESTON'S INTERPRETATION OF THE CONTRACT MADE THE OBJECTIVES OF THE ASSOCIATES POSSIBLE AND THE TRIAL COURT'S ERRONEOUS CONTRACT LAW FINDINGS AS WELL AS THE APPELLATE COURT'S ERRONEOUS NEW FACT FINDINGS MAKE THOSE OBJECTIVES IMPOSSIBLE.

Weston in early December of 1982 in response to an inquiry from Associate Coastal Computer Inc. regarding his interpretation of assessability wrote a lengthy letter setting forth his interpretation of the JOA provisions for assessability.[19] His interpretation as set forth in the letter was affirmed in the appeals court's findings regarding assessability. (See page 9)

The trial court found that the Associates were not liable for production costs. (Amend Conclusion of Law 7)

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[19] The letter dated December 14, 1982 entitled Interpretation of Contract Provisions "Constancy Amid Change" was addressed to Associate Coastal Computer Inv. and is found in Appendix "B".

The trial court interpreted paragraph 13(c) of the operating agreement that there was no liability for start-up production costs except as offsets to proceeds from production.[20] Both at the D.C. trial and on appeal Cascade and Weston contended that as specified in the contracts they were to be construed under Utah law.

Under Utah law the document is viewed in its entirety so all of its parts can be given effect in accordance with its overall purpose.[21] An interpretation that makes the contract possible and capable of achieving its purpose is

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[20] As a result the joint venture working interests were found to be nonassessable (D.C. Amend Findings No.s 36,37,66,103,104).

[21] Larrabee v. Royal Dairy Products Co., 614 P.2d 160 (Utah 1980; Minshew v. Chevron Oil Co., 575 P.2d 192 (Utah 1978)

preferred.[22] Once interpreted, the court's obligation is to enforce the agreement without regard to the wisdom of a party entering into the agreement.[23] Weston further contended that liability for assessments was unambiguously expressed in ¶¶s 10(a), 13(a)(b) of the operating agreement ("JOA". The JOA provided that liability for costs of "mining", "milling" and costs of "ore removal" which are production costs, were an Associate obligation. But! that 13(c) placed a floor under the Associates liability for costs of mining uneconomical ore. Contrary to the trial court's interpretation of 13(c) Weston asserted that 13(c) did not negate

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[22] Stangle v. Todd, 554 P.2d 1316, 1319-20 (Utah 1976).

[23] Skousen v. Smith, 27 Utah 2d 169, 493 P.2d 1003,1005 (1972)

liability expressed in 13(b) but, rather protected the Associates by restricting the Operator from charging for ore produced, which, when sold, was insufficient to recover production costs. Thus assessments could be made until cash flow was sufficient to pay for production. The Operator could not assess beyond the gross value of the Associates'interests in minerals mined, milled and removed to the leach pad and interests in proceeds due from the sale of gold. Weston argued that ¶ 10(a) of the JOA imposed liability above $800,000 loan amount which reads:

> "10. Compensation...of Operating Manager. The Purchasers agree that the Operating Manager shall be paid...
> (a) reimbursement of its out-of-pocket costs of... operating,... expense,...

Weston also contended the trial Court's interpretation should be rejected

because it defeated the purpose and objective of the contracts (production of gold) making them impossible to perform. The trial court erroneously also found the contracts to be impossible to perform where it found no financing for start-up production costs was provided for in the agreements, where some Associates were unwilling to voluntarily pay such costs. (Finding 116).

IV. THE APPELLATE COURT'S CONTROLLING LAW CONCLUSION INTERPRETING THE OPERATING AGREEMENT IS IN AGREEMENT WITH CASCADE'S AND WESTON'S INTERPRETATION, IS CONTRARY TO THE TRIAL COURT'S CONCLUSION OF LAW; HENCE THEY COULD NOT HAVE ACTED IN BAD FAITH IN ATTEMPTING TO COLLECT ASSESSMENTS.

As noted above Weston argued the $800,000 development loan was allocated and reserved to be spent for "development expenses only" and the contracts provided for assessability to pay for production expenses up to the value of

the gold in the ore removed for final gold extraction. As noted on page 9 above the appeals court similarly found the contracts provided for assessability.[24] The appeals court also said the Associates would have additional liability for production costs when minerals were removed from the property and would be required to make additional cash contributions based upon the contemplated gold production.[25] Untenably and in spite of all the foregoing, the

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[24] "In our view, paragraphs 13(b) and 13(c), when read together provided that the Associates were required to pay additional ...production costs out of their share of the contemplated gold production." ... "...the Associates are not responsible for additional payments beyond each Associate's share of the minerals that were actually produced and removed from the mine. (emphasis added). Cascade v. Banks, supra 1568

[25] See Cascade v. Bank, supra 1568 "to pay...production costs out of... **contemplated** gold production."

appellate court erroneously stated that no assessments were warranted because the project was not economically viable.

V. THE APPELLATE COURT'S NEW FINDINGS THAT THERE WAS LITTLE OR NO GOLD PRODUCED WAS CLEARLY ERRONEOUS AS GOLD WAS EXTRACTED AND SOLD AND A MAJORITY OF THE DEFENDANT ASSOCIATES FAILED TO PAY THE COSTS NECESSARY TO PRODUCE THE GOLD

Mining and milling of ore started in April of 1982. As set forth in Telegraph Mine Associates Fiduciary Accounting,[26] as provided the court and defendants by Cascade during the accounting phase of the D.C. trial "Management Operations Control Account No. 1001" and offsetting account "3002" entitled "Product (Gold) Sales from Operations," (See Appendix "B") by the end of October 1982 there was $175,233.87 available from the actual sale of gold extracted

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[26] See District Court NR 313.

from the ore by heap leaching and the rate of gold extraction was rapidly increasing.

The amount of $175,233.87 was expended as directed by the Associates Management Committee in the means to increase production and was not available to pay for past production costs.[27] Assuming, for sake of illustration, that the $175,233.87 constituted a break even cost in production. The pro rata share of the costs would have been $4,974.31 per Associate 1/35 working interest. By the end of October 1982 the defendant Associates had paid the following amounts.

Units	Defendant	Aug 31	Sept 31	Total
1	Banks		1,000	1,000
1	Coastal			0
1	Davis			0

[27] See D.C. trial transcript pgs. 1062-1067, D.C. trial exhibit 115A.)

1 Henry	4,200		4,200
1 Mann	2,000		2,000
1 Mann Caldwell			0
1 Nickerson			0
1 Samarin		5,000	5,000
1 E. Stoltenberg			0
2 H. Stoltenberg	1,400	2,400	3,400
1 Ashley		9,231	9,231*
1/2 Slater		2,307.75	2,307.75
1 Doub		9,231	9,231
1 Hambarian	9,258.31		9,258.31
1/2 Ascher		4,615.50	4,615.50
1/2 Waugh	4,516		4,516
1 H & H	4,500		4,500
Total			$59,259.56*

*Ashley later paid a total of $20.421.12 which provided a combined total of $70,449.68 as awarded by the trial court.

Even so, defendants Banks, Coastal Computers, Davis, Henry, Mann, Mann Caldwell Partnership, Nickerson, Ed Stoltenberg, H. Stoltenberg, Slater and Harmatz & Hodowski did not pay their share of the production costs of the ore mined, milled, removed and actually sold as determined to be assessable by the appeals court in it's controlling decision.

VI. THE CONTRACT DOCUMENTS DEFINE "PROPERTY" AS THE ORIGINAL SEVEN LEASED MINING CLAIMS WHICH STRADDLE THE ORE DEPOSIT, THERE WERE NO MILL SITE CLAIMS AND ALL ORE MINED AND MILLED WAS REMOVED FROM THE PROPERTY FOR FINAL GOLD EXTRACTION AND MET THE REQUIREMENTS OF JOA ¶ 13(c).

Upon execution of the Joint Operating Agreement only seven claims were leased[28] and only the Telegraph claim was mined. Mill site claims were later acquired by the Associates upon which to construct heap leach facilities for final gold extraction. All references to "Property" within the contract documents (JOA ¶ 13(c)) by contract definition can only mean these seven claims and in particular the Telegraph claim. JOA paragraph 13(c) references to "removed from the property" could only mean ore removed from it's in situ residence on

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[28] See District Court trial Exhibits 300, 303 and 301.

the Telegraph claim (or any of the other six mining claims). Mining i.e blasting and excavating, is a condition of ore removal. Crushing and agglomeration are conditions of milling. Accordingly the ore that had been mined from the Telegraph claim, crushed, agglomerated and removed from the "property" (i.e. Telegraph claim) to the mill site claims for final gold extraction fulfills all the contractual requirements imposed by 13(c) for assessability as found by the appeals court.[29]

By the end of October 1982 at least 23,080 tons of ore had been mined, crushed, agglomerated and removed to the

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[29] See exhibit of gold production as attached to the Affidavit of W. David Weston in Appendice "B" as derived from production records as submitted to appellate court and derived from reports, and exhibits submitted to the trial court.

leach pile for gold extraction. By the end of October 1982, 504.67 ounces of gold had been extracted worth $175,233.87. 4790.87 ounces of gold remained under continuous process of gold extraction which had a "contemplated" extractable value of $1,015,880 (gold at $344.98). To pay for the costs of mining, milling and removing this ore to the leach pad for final gold extraction by the end of October 1982, the Associates had been assessed $321,984.60 (pro rata 1/35 amount of $9,199.56).

CONCLUSION

The judgment of the court of appeals found in it's IV. Conclusions 1, 2 and 5 of the appellate court's Published Opinion should be reversed. The Court should grant what other relief it may find just.

The appellate court correctly overturned the trial court's conclusion of law regarding the non assessability of the parties agreements. The appellate court erred in not finding that the trial court's conclusion of law decision, that the agreements did not provide for assessability, was clearly erroneous.

The trial court is the appropriate fact finding court and the appellate court erred in making new findings of fact to the effect there was little or no gold at the Telegraph Mine which finding was contrary to the trial court's finding and the record.

After the appellate court decided that the agreement between the parties provided that the defendants were required to pay assessments, the appellate court then erred in not further determining

the district court's finding, that Cascade and Weston (in assessing the defendants) breached their fiduciary duty and acted in bad faith, was not clearly erroneous.

Neither Cascade or Weston could have acted in bad faith in assessing the Associate Defendants as they did not pay for the production costs "... of the contemplated gold production" or even the costs of producing the gold actually sold. Neither Cascade or Weston could have acted in bad faith in assessing the Associates as they were responsible under ¶ 13(b) and 13(c) for additional payments for each Associate's share of the minerals that were actually produced and removed from the mine. The Associate Defendants did not pay for the production costs as required by 13(c)

and those amounts that were paid should not be reimbursable as required by the trial court.

Respectfully submitted

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Pro Se